(1)

87-612

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN ERVIN DEKLE, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. In a Continuing Criminal Enterprise trial, does the unanimous verdict rule preclude a guilty verdict if the jurors fail to agree unanimously on the three predicate offenses which establish the essential element of a continuing series of violations?

2. Is the defendant in a Continuing Criminal Enterprise trial entitled upon request to an instruction that, in order to convict, the jury must agree unanimously on the three predicate offenses which establish the continuing series of violations?

3. Was the denial of such an instruction in petitioner's Continuing Criminal Enterprise trial properly evaluated on appeal under the plain error standard, where petitioner requested the instruction and specifically objected to its omission before the jury retired to consider its verdict?

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OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. John Ervin Dekle, Jr.*, No. 86-4553 (5th Cir. Aug. 17, 1987), is attached as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 17, 1987. This petition is filed within sixty days of that ruling. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III, Section 2 of the United States Constitution provides, in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .

Amendment VI to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

Title 21, United States Code, Section 848, the Continuing Criminal Enterprise statute, provides, in pertinent part:

> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine . . . and to the forfeiture prescribed in section 853 of this title; . . . .
>
> * * * *
>
> (d) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Rule 30 of the Federal Rules of Criminal Procedure provided as follows:

> Rule 30. Instructions.
>
> At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 31 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> (a) *Return.* The verdict shall be unanimous . . . .

STATEMENT OF THE CASE

Petitioner John Ervin Dekle, Jr., was convicted in the United States District Court for the Southern District of Mississippi, Jackson Division, of engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. (The indictment is contained in Appendix B.) The United States Court of Appeals for the Fifth Circuit affirmed his conviction in an unreported opinion on August 17, 1987. (Appendix A.)

To prove that petitioner had undertaken "a continuing series of violations," 21 U.S.C. § 848(d)(2), an element

of the CCE offense, the Government presented evidence at trial of approximately ten predicate drug offenses occurring between 1982 and 1985. One of these offenses was the alleged importation of 1140 pounds of marijuana to Copiah County, Mississippi, on July 9, 1985.[1] The other alleged predicate offenses were conspiracies to possess marijuana at various locations in Florida, Georgia and Alabama with intent to distribute. The testimony or other evidence presented to establish each predicate offense varied with the offense.[2]

Three predicate offenses were necessary to establish the "continuing series" element. Petitioner's trial counsel orally and in writing asked the court to require the jury to be unanimous on the particular three predicate offenses they found. But the prosecutor argued that such unanimity was not required, and the court declined to so instruct. (Tr. 750, contained in Appendix C.)

The court thereafter charged that a continuing series of violations meant "three or more successive violations of the federal drug laws over a definite period of time with a single or substantially similar purpose." (Tr. 809, contained in Appendix D.) The court did not require the jury to agree on the three violations found. On the question of unanimity, the court instructed only that the "verdict" had to be unanimous. (Tr. 818, contained in Appendix D.)

Thus the instructions permitted the jury to convict so long as each juror found that petitioner had committed

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[1] The Copiah County offenses are the subject of Counts I to IV of the indictment. Petitioner is not named in those counts. He allegedly shared responsibility for the Copiah County offenses under the vicarious liability rationale articulated for conspiracy offenses in *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

[2] The CCE count of the indictment (Count V) enumerated eleven predicate offenses. The Government did not present any evidence as to some, but did as to others not listed in the indictment.

three predicate offenses, even if the jurors disagreed as to which predicate offenses those were. At the conclusion of the charge, petitioner's counsel therefore renewed his request that the jury "be instructed that they would have to unanimously agree upon the specific predicate offenses which they believe make up the charge of the continuing criminal enterprise." (Tr. 822, contained in Appendix D.) The court again denied counsel's request. (*Id.*)

On appeal, the Fifth Circuit upheld this ruling, on the theory that the trial court had reasonably misconstrued the post-instruction objection as directed solely at the form of the verdict.[3] (Appendix A at 3a-4a.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted pursuant to Rule 17.1(a) and (c) of this Court's Rules. This petition presents important questions under the Constitution and laws of the United States concerning the unanimous verdict rule in CCE prosecutions. Analogous questions are present in RICO cases, which require proof of two predicate racketeering offenses, and in many other contexts. The federal courts of appeals which have addressed these questions are in conflict. In our view, the questions have been answered in petitioner's case erroneously, and inconsistently with settled precedents of this Court. The trial court's refusal to instruct as requested allowed the jury to convict based on an unconstitutionally lax conception of what is meant by a unanimous verdict.

The trial court was correct in requiring petitioner's jury to find that he had committed three predicate drug

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[3] Petitioner's counsel had also requested that the jury be required to specify which predicate offenses they found in the verdict form. (Tr. 750, contained in Appendix C.) When he objected at the conclusion of the charge, he stated that requiring such specification in the verdict form would be an acceptable alternative to the specific unanimity instruction he requested. (Tr. 822, contained in Appendix D.)

offenses before they could convict him of a CCE violation.[4] However, the jurors could have construed this requirement in two equally plausible ways. They could have understood that they all had to agree on the same three predicate offenses, as petitioner's counsel contended. Alternatively, however, they could have believed that they could disagree about which predicate offenses petitioner had committed so long as they all did agree that he had committed three of them. This was the prosecutor's view, and apparently the trial court's as well. The cryptic instruction that "the verdict" had to be unanimous was consistent with either alternative.[5] It is impossible to know which approach petitioner's jury in fact chose.

The right to a unanimous verdict in federal criminal trials derives from the Constitutional right to trial by jury,[6] and is specifically provided for in Rule 31(a), Fed. R. Civ. P. However, as the Fifth Circuit said in *United States v. Gipson*, 553 F.2d 453, 456 (5th Cir. 1977), the scope of this right is "unfortunately" not clear.

In *Gipson* the defendant was charged with violating 18 U.S.C. § 2313, which prohibited receiving, concealing, storing, bartering, selling or disposing of a stolen vehicle moving in interstate commerce. The trial court had instructed that if each juror found that the defendant knowingly did any one of those six acts, then the jury could return a unanimous verdict of guilty, "even though

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[4] *See Garrett v. United States*, 105 S. Ct. 2407, 2425 and n.19 (1985) (Stevens, J., dissenting); *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

[5] *Cf. Francis v. Franklin*, 105 S. Ct. 1965, 1974 (1985), holding that general instructions on the state's burden of proof and the defendant's presumption of innocence are not inconsistent with an impermissible conclusive or burden-shifting instruction.

[6] U.S. Const. art. III, § 2; amend. VI; *see Johnson v. Louisiana*, 406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972).

there may have been disagreement within the jury as to whether it was receiving or storing or what." *Gipson*, 553 F.2d at 456. The court of appeals held that this instruction violated the defendant's right to a unanimous verdict. It concluded that the unanimity rule "requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." *Id.* at 457-58.

Even on an issue this fundamental, there is division. The holding of *Gipson* is probably the majority view, but not all courts of appeal have agreed with it. For example, in *United States v. Zeidman*, 540 F.2d 314, 318 (7th Cir. 1976), a mail fraud prosecution, the Seventh Circuit upheld an instruction that allowed the jury to convict if they found that the defendant had schemed to defraud either the creditor or the debtor, although the jurors might disagree as to which one it was. Similarly, in *United States v. Murray*, 618 F.2d 892, 898 (2d Cir. 1980), the Second Circuit upheld an instruction permitting the jury to convict of conspiracy so long as each juror found one of the alleged objects to have been proved, even if jurors disagreed on which object it was. *See also United States v. Peterson*, 768 F.2d 64, 66-67 (2d Cir.), *cert. denied*, 106 S. Ct. 257 (1985). And in *United States v. Raffone*, 693 F.2d 1343, 1347-48 (11th Cir. 1982), *cert. denied*, 461 U.S. 931 (1983), a CCE case, the court strongly implied that unanimity was unnecessary on the statutorily required five persons with whom the defendant had acted in concert.

Gipson surely states the correct rule, however. Any other rule would permit a unanimous verdict to mask profound disagreement about what a defendant did. In petitioner's case, for example, it is entirely possible that some jurors found that he committed only predicate offenses A, B and C, while others found only predicate offenses D, E and F. If so, the jurors did not find any

particular "continuing series of violations" proven, but, under the court's instructions, could return a verdict of guilty anyway.

The instruction which petitioner specifically requested would have prevented this possibility. A long line of authority emanating from this Court compels the conclusion that this instruction should therefore have been given to effectuate petitioner's right to a unanimous verdict. For since *Stromburg v. California*, 283 U.S. 359 (1931), it has been settled that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside. When misleading jury instructions have given rise to such a possibility, this Court has repeatedly ordered a new trial. *E.g.*, *Francis v. Franklin*, 105 S. Ct. 1965 (1985).

The courts of appeals, however, are split on the necessity of an instruction such as petitioner sought. At least one court has held the failure to give a specific unanimity instruction to be plain error. *United States v. Payseno*, 782 F.2d 832, 834-37 (9th Cir. 1986). The rule in the Ninth Circuit is that the standard general unanimity instruction, such as was given in petitioner's case, is insufficient whenever there is "a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts," *United States v. Echeverry*, 719 F.2d 974 (9th Cir. 1983). Had this rule been applied in petitioner's case, his conviction would have been reversed.

Other circuits, however, have upheld the refusal to give a requested specific unanimity instruction, because "[i]t is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert.*

denied, 425 U.S. 934 (1976).[7] This oft-stated assumption is dubious; if the prosecutor in petitioner's case, for example, did not think that the general instruction required unanimity on the predicate offenses, it is difficult to see why the jury should necessarily have thought so. It is telling that some of the same courts which have upheld the sufficiency of the general unanimity instruction have nonetheless encouraged trial courts to give the specific instruction where it is applicable. *Natelli*, *supra* at 325; *United States v. Mangieri*, 694 F.2d 1270, 1281 (D.C. Cir. 1982); *United States v. Cauble*, 706 F.2d 1322, 1345 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). In *Cauble*, a RICO prosecution, the trial judge had failed to instruct the jury that they must be unanimous on the necessary two predicate acts of racketeering in order to convict. While holding that this failure was not plain error, the Fifth Circuit also said that the specific instruction "might have been better practice." *Id.* "[H]ad trial counsel made such a request the trial judge would have been able to consider it and likely would have granted it." *Id.*

In petitioner's case, trial counsel did make a specific request, but it was denied. On appeal, however, the Fifth Circuit upheld the trial court on the ground that no "proper request" had been made. Appendix A at 4a. According to the court of appeals, it was not "clear" to the trial court that petitioner sought a specific unanimity instruction, as opposed to a modified verdict form. *Id.* at 3a-4a.

This rationale should not deter this Court from granting the writ in this case. The appeals court apparently overlooked the specific request which defense counsel made before the trial court instructed the jury. (Appendix C.) The trial court was in no way confused when it denied that request at that time. Given that denial, it

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[7] *Accord, United States v. Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982).

cannot seriously be maintained that had counsel articulated his post-instruction request more clearly, the trial court would have granted it. Furthermore, that request (at Tr. 822 in Appendix D) fully complied with the objection requirement of Rule 30, Fed. R. Crim. P. As Professor Wright states:

> [T]he requirement of objections should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed, rather than being made into a trap for the unwary. Accordingly, where court and opposing counsel understand the defendant's position, even a vague objection should be held sufficient.

Wright, *Federal Practice and Procedure*: Criminal 2d § 484, pp. 699-701 (footnotes omitted). In this case, petitioner's trial counsel distinctly requested, in the alternative, a jury instruction on the need for unanimity as to the predicate offenses. On appeal to the Fifth Circuit, the Government never argued that petitioner's counsel had not made a proper request, or that the trial court did not understand what that request was.

In sum, this Court should grant this petition to clarify the scope of the unanimous verdict rule, and the defendant's right to a jury instruction which effectuates that rule.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4553

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOHN ERVIN DEKLE, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

(CR-J86-00015(L))

(August 17, 1987)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge: *

John Dekle appeals his conviction for being an organizer, supervisor, or manager of a continuing criminal enterprise, 21 U.S.C. § 848. He claims that the trial court erred in four respects: (1) it refused his request

to instruct the jury that to convict him they must unanimously agree on each of three predicate offenses and that they must specify which predicate offenses they unanimously agree defendant committed; (2) it denied defendant's motion for judgment of acquittal on one of the predicate offenses; (3) it denied defendant's motion to require the government to make available to defense certain investigative reports; (4) it permitted a narcotics conspiracy to serve as a predicate offense in the continuing criminal enterprise charge. We affirm.

The first four counts of the indictment named Jerry Moore, Bruce Wilson, and James Moore, and all related to various aspects of a plan to import 1140 pounds of marijuana to Copiah County, Mississippi, on July 9, 1985. Count five named those three defendants and three others, namely, John Dekle, Chris Vandemere, and Glenn Trout. It alleged that all six aided and abetted in the acts alleged in the first four counts and that these violations were a part of a continuing series of violations undertaken in concert with at least five additional persons, with the named defendants occupying positions of organizer, supervisor, or manager. The other predicate offenses listed included a 1982 conspiracy in Alabama to possess with intent to distribute a planeload of marijuana, a 1982 conspiracy in Sacramento, California, to possess with intent to distribute 8000 pounds of marijuana, three separate 1983 conspiracies in Alabama to possess with intent to distribute three planeloads of marijuana, two 1984 conspiracies in Louisiana to possess with intent to distribute 2100 pounds and 2000 pounds of marijuana, two 1984 Alabama conspiracies involving 1100 pounds of marijuana and a planeload of marijuana, and a 1984 Alabama conspiracy to possess with intent to distribute 1100 pounds of cocaine.

The case went to trial in July of 1986, with Dekle the only defendant. James Moore had pleaded guilty and the remaining defendants were still at large. The jury

found Dekle guilty as charged in count five of the indictment.

After instructing the jury, the judge excused the jurors and asked whether the parties had any objections to the instructions or requested any additional ones. Defense made a num' er of requests. Among them was the statement that

> the defendant is entitled to a form of the verdict wherein the defendant would be—the jury would be instructed that they would have to unanimously agree upon the specific predicate offenses which they believe make up the charge of the continuing criminal enterprise, and wherein the jury would have to specify those predicate offenses for which they believe the defendant participated in that amounts to the continuing criminal enterprise. Whether you call it form of the verdict or jury instruction or whether you call it an interrogatory to the jury, you know, any form, I think the defendant is entitled to and would request that.

The court simply replied that it believed that the jury verdict form was proper and that the jury should not be required to list offenses.

Appellant argues that the court's refusal to give its requested additional jury instruction is reversible error. We disagree. The trial judge reasonably construed defense's objection as directed at the form of the verdict. There is no authority for the proposition that the verdict form in a continuing criminal enterprise case must require the jury to list in writing three predicate offenses. The court committed no error in denying defense counsel's request, which it reasonably construed as going to the form of the verdict.

On appeal, however, Dekle argues, not that he should have received the requested verdict form, but that the court should have instructed the jury as to the unanimity

requirement. We note that the judge's instructions to the jury did include the observation that: "Any verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. In other words, your verdict must be unanimous." Additionally, when reading the verdict form to the jury, the judge stated: "the foreman or forewoman will date the verdict. There is a line underneath it for that person to sign. There are eleven more lines for the rest of you to sign signifying your unanimous verdict." As we stated in *United States v. Bartlett*, 633 F.2d 1184, 1189 (5th Cir. 1981), "[i]t is axiomatic in this Circuit that the jury charge *as a whole* must be examined to see if the jury was misled and whether the defendant was thus prejudiced" (emphasis in original). Moreover, defense counsel carefully explained to the jury that it must be unanimous as to each element of the offense.

When the district court denied the combined request for an additional instruction on unanimity and a revised verdict form, if Dekle wanted the additional instruction even without the revised verdict form, he should have made that clear to the district court. The court's failure to give the additional instruction in the absence of a proper request was not plain error.

Appellant's second contention is that he should have been granted acquittal on the predicate offenses charged in counts one through four of the indictment. These counts named Jerry Moore, Bruce Wilson, and James Moore, and related to a transaction importing 1140 pounds of marijuana to Copiah County, Mississippi. Appellant Dekle was not named in these counts, but in count five of the indictment he was charged with being an organizer or supervisor of a continuing criminal enterprise and it was alleged that the aforesaid acts were committed as part of this enterprise.

In *Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946), the Supreme Court held that if a conspiracy has been shown,

> so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that an "overt act of one partner may be the act of all without any new agreement specifically directed to that act." Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Yet all members are responsible, though only one did the mailing. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. [citations omitted.]

In *United States v. Michel*, 588 F.2d 986, 999 (5th Cir. 1979), we held that "[t]he *Pinkerton* vicarious-liability rationale is based on an agreement," and that "[t]his element is also present in the offense set out in 21 U.S.C. § 848—conducting a continuing criminal enterprise." The court concluded:

> we hold *Pinkerton* and its progeny equally applicable to defendants charged with either conspiracy to violate the drug laws or a section 848 continuing criminal enterprise. The appellate inquiry is whether the government offered sufficient proof that a jury might reasonably conclude that an agreement or common purpose to violate the Drug Control Act existed. If this concert of action has been proved,

> all members of the enterprise, including the organizer, manager, or supervisor, are responsible for the substantive offenses committed by each member during the coure of and in furtherance of the plan.

Id. The government in the instant case unquestionably offered sufficient proof that the jury could reasonably conclude that there was an agreement to violate the Drug Control Act. Thus, Dekle could be held responsible for the Copiah County, Mississippi, offenses regardless of whether he personally travelled to Mississippi. Under the principles of *Pinkerton* and *Michel*, the court did not err in denying appellant's motion for acquittal.

Appellant's third complaint is that the trial court should have made available to him certain reports prepared by an agent of the Drug Enforcement Administration. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." In the instant case, however, the requested reports related only to impeachment of government witnesses and were not material either to Dekle's guilt or to his punishment. Appellant claims that the report "contained material favorable to the accused." As examples, he cites the fact that at trial government witness Hamm stated that Dekle threatened he would be killed if he talked, but that this statement was "omitted" from the report. He also notes a discrepancy between the report and the trial testimony as to the date on which Hamm met Dekle. This is clearly impeachment material at best, and the court conducted an *in camera* investigation of the reports before ruling on defense's request. Moreover, even if the court had not conducted such an investigation, nondisclosure would require reversal only if " 'the information withheld [has] a definite impact on the credibility of an important prosecution witness.' " *United States*

v. Gaston, 608 F.2d 607, 613 (5th Cir. 1979) (quoting *Calley v. Callaway*, 519 F.2d 184, 222 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976)). The report was never intended as a verbatim recital of an interview, and there is nothing to show that making the report available would have had the requisite impact on Hamm's testimony.

Appellant's final assertion is that the court erred in allowing the government to use conspiracy violations as the predicate offenses for a continuing criminal enterprise. Appellant cites *United States v. Lurz*, 666 F.2d 69, 76 (4th Cir. 1981), for the proposition that one may not first prove a conspiracy to distribute to establish a violation under 21 U.S.C. § 846 and then convict under 21 U.S.C. § 848 using the same conspiracy. What appellant overlooks is that he has not been convicted under section 846, the conspiracy section, but only under section 848, the continuing criminal enterprise section. The Fourth Circuit stated in *Lurz*: "Had there been no previous conviction of the Florida conspiracy, its facts could clearly have been used to prove a continuing series of violations in concert with five or more persons." 666 F.2d at 76. Moreover, in *Jeffers v. United States*, 432 U.S. 137, 150-51, 97 S.Ct. 2207, 2215-16, 53 L.Ed.2d 168 (1977), a plurality of the Supreme Court held that a drug conspiracy which is subject to prosecution under section 846 is a lesser included offense of a section 848 continuing criminal enterprise offense. It necessarily follows from this that such a conspiracy, if in fact defendant was not convicted for it under 846, is precisely the sort of predicate offense contemplated by the continuing criminal enterprise statute, section 848. *See also, United States v. Stricklin*, 591 F.2d 1112, 1123 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 379 (1979); *Lurz*, 666 F.2d at 76. Appellant's contention has no merit.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Criminal No. J86-00015(W)

UNITED STATES OF AMERICA

VS.

JERRY LAIN MOORE, BRUCE DOUGLAS WILSON,
JAMES MOORE, CHRIS VANDEMERE,
JOHN ERVIN DEKLE, JR. and GLENN TROUT

[Filed Feb. 20, 1986]

The Grand Jury Charges:

COUNT I

That from on or about April 1, 1985, and continuing through on or about July 9, 1985, in Copiah County in the Jackson Division of the Southern District of Mississippi and elsewhere, JERRY LAIN MOORE, BRUCE DOUGLAS WILSON and JAMES MOORE, defendants herein, knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to knowingly and intentionally possess with intent to distribute approximately 1,140 pounds of marihuana, a Schedule I(c) non-narcotic drug controlled substance, as prohibited by Section 841(a)(1), Title 21, United States Code.

It was part of the conspiracy that the defendants and others would bring in and receive a quantity of marihuana from an aircraft in Copiah County, Mississippi, on July 9, 1985.

All in violation of Section 846, Title 21, United States Code.

COUNT II

That on or about July 9, 1985, in Copiah County in the Jackson Division of the Southern District of Mississippi, JERRY LAIN MOORE, BRUCE DOUGLAS WILSON and JAMES MOORE, defendants herein, knowingly and intentionally did possess with the intent to distribute approximately 1,140 pounds of marihuana, a Schdule I(c) non-narcotic controlled substance, and did aid and abet each other and others, in the aforesaid acts in violation of Section 841(a)(1), Title 21, United States Code and Section 2, Title 18, United States Code.

COUNT III

That from on or about April 1, 1985, and continuing through on or about July 9, 1985, in Copiah County in the Jackson Division of the Southern District of Mississippi and elsewhere, JERRY LAIN MOORE, BRUCE DOUGLAS WILSON and JAMES MOORE, defendants herein, knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to knowingly and intentionally import into the United States from without its customs territory approximately 1,140 pounds of marihuana, a Schedule I(c) non-narcotic controlled substance, as prohibited by Sections 952(a) and 960(a)(1), Title 21, United States Code.

All in violation of Section 963, Title 21, United States Code.

COUNT IV

That on or about July 9, 1985, in Copiah County in the Jackson Division of the Southern District of Mis-

sissippi and elsewhere, JERRY LAIN MOORE, BRUCE DOUGLAS WILSON and JAMES MOORE, defendants herein, did knowingly and willfully import approximately 1,140 pounds of marihuana, a Schedule I(c) non-narcotic controlled substance, into the customs territory of the United States from outside thereof, and did aid and abet each other and others in the aforesaid acts, in violation of Sections 952(a) and 960(a)(1), Title 21, United States Code and Section 2, Title 18, United States Code.

COUNT V

That from an unknown date, believed to be on or about 1978 continuously thereafter up to and including the date of this indictment, in Copiah County in the Jackson Division of the Southern District of Mississippi, and elsewhere, JERRY LAIN MOORE, BRUCE DOUGLAS WILSON, JAMES MOORE, CHRIS VANDEMERE, JOHN ERVIN DEKLE, JR. and GLENN TROUT, defendants herein, aided and abetted by each other, knowingly, unlawfully, willfully and intentionally did engage in a Continuing Criminal Enterprise in that JERRY LAIN MOORE, BRUCE DOUGLAS WILSON, JAMES MOORE, CHRIS VANDEMERE, JOHN ERVIN DEKLE, JR. and GLENN TROUT did unlawfully, willfully, intentionally and knowingly violate Title 21, United States Code, Sections 841(a)(1), 846, 952, 960 and 963 and did aid and abet each other and others in the aforesaid acts, which violations were a part of a continuing series of violations of Subchapters I and II of the Comprehensive Drug Control Act of 1970 (21 U.S.C. § 801, *et seq.*) undertaken by said defendants in concert with at least five other persons, with respect to whom JERRY LAIN MOORE, BRUCE DOUGLAS WILSON, JAMES MOORE, CHRIS VANDEMERE, JOHN ERVIN DEKLE, JR. and GLENN TROUT defendants herein, occupied a position of organizer, supervisor or manager. Said continuing series of violations included, but are not limited to, the following violations:

1. Those violations alleged in Counts I, II, III and IV of this indictment which are incorporated by reference as if fully set forth herein.

2. That on or about 1982, in Demopolis, Alabama, and elsewhere, JERRY LAIN MOORE and CHRIS VANDEMERE, knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute a planeload of marihuana, a Schedule I(c) non-narcotic drug controlled substance, in violation of Sections 841(a)(1) and 846, Title 21, United States Code.

3. That on or about September, 1982 through March, 1983, in Sacramento, California, and elsewhere, JERRY LAIN MOORE, BRUCE DOUGLAS WILSON and CHRIS VANDEMERE knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute approximately 8,000 pounds of marihuana, a Schedule I(c) non-narcotic controlled substance, in violation of Sections 841(a)(1), and 846, Title 21, United States Code.

4. That on or about March 25, 1983, in Perry County, Alabama, and elsewhere, JERRY LAIN MOORE, CHRIS VANDEMERE, and GLENN TROUT, knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute a planeload of marihuana, a Schedule I(c) non-narcotic controlled substance, in violation of Sections 841(a)(1) and 846, Title 21, United States Code.

5. That on or about August, 1983, in Brilliant, Alabama, and elsewhere, JERRY LAIN MOORE and CHRIS VANDEMERE knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute a planeload of marihuana, a Section I(c), non-

narcotic controlled substance, in violation of Section 841(a)(1) and 846, Title 21, United States Code.

6. That on or about September through October, 1983, in Brilliant, Alabama, and elsewhere, JERRY LAIN MOORE and JOHN ERVIN DEKLE, JR., knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute a planeload of marihuana, a Schedule I(c) non-narcotic controlled substance, in violation of Sections 841(a)(1) and 846, Title 21, United States Code.

7. That on or about February, 1984, in New Iberia, Vermillion Parish, Louisiana, and elsewhere, JERRY LAIN MOORE and BRUCE DOUGLAS WILSON, knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute approximately 2,100 pounds of marihuana, a Schedule I(c) non-narcotic controlled substance, in violation of Sections 841(a)(1) and 846, Title 21, United States Code.

8. That on or about June, 1984, in Forkland, Alabama, and elsewhere, JERRY LAIN MOORE and JOHN ERVIN DEKLE, JR., knowingly and willfully did conspire with each other and with others known and unknown to the grand jury to possess with intent to distribute approximately 1,100 pounds of marihuana, a Schedule I(c) non-narcotic drug controlled substance, in violation of Sections 841(a)(1) and 846, Title 21, United States Code.

9. That on or about May 15, 1984, through June 20, 1984, in New Iberia, Louisiana, and elsewhere, JERRY LAIN MOORE and BRUCE DOUGLAS WILSON, knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute approximately 2,000 pounds of marihuana, a Schedule I(c) non-narcotic controlled sub-

stance, in violation of Section 841(a)(1) and 846, Title 21, United States Code.

10. That on or about June through August, 1984, in Emelle, Alabama and elsewhere, JERRY LAIN MOORE and GLENN TROUT; knowingly and willfully did conspire with each other and with others known and unknown to the Grand Jury to possess with intent to distribute approximately 1,100 pounds of cocaine, a Schedule II(a) narcotic drug controlled substance in violation of Sections 841(a)(1) and 846, Title 21, United States Code.

11. That on or about September 6 through September 14, 1984, in Union Springs, Alabama, and elsewhere, JERRY LAIN MOORE knowingly and willfully did conspire with others known and unknown to the Grand Jury to possess with intent to distribute a planeload of marihuana, a Schedule I(c) non-narcotic controlled substance, in violation of Section 841(a)(1) and 846, Title 21, United States Code.

From the continuing series of violations described above, the defendants JERRY LAIN MOORE, BRUCE DOUGLAS WILSON, JAMES MOORE, CHRIS VANDEMERE, JOHN ERVIN DEKLE, JR. and GLENN TROUT obtained substantial income or resources to which the United States is entitled to forfeiture, including all profits obtained by the defendants JERRY LAIN MOORE, BRUCE DOUGLAS WILSON, JAMES MOORE, CHRIS VANDEMERE, JOHN ERVIN DEKLE, JR. and GLENN TROUT arising from their participation in this Continuing Criminal Enterprise, and any of their interests, property, and contractual rights of any kind affording a source of influence over this enterprise, including but not limited to the following:

The following interests of the defendant JERRY LAIN MOORE:

1. Route 1, Bay Creek Church Road, Loganville, Walton County, Georgia, further described as:

Land Lot 113 of the 4th Land District of Walton County, Georgia, Vinegar Hill G.M.D. 415 and being known as Tracts 8-A, 8-B and 8-C according to a plat of survey for Charles G. Humphries and Barbara J. Humphries and being recorded at Plat Book 20, Page 437, Walton County records, including but not limited to all buildings, structures, fixtures, furnishings, appurtenances and any and all contents therein.

2. Monroe-Youth Road, Monroe, Walton County, Georgia, further described as:

All that tract or parcel of land lying and being in Land Lot 146, 4th District, Buncombe GMD, Walton County, Georgia, containing 37.30 acres, as shown on a plat of survey prepared by William J. Gregg, Sr., Registered Professional Land Surveyor No. 1438, dated August 21, 1985, revised August 23, 1985, and recorded in Plat Book 36, page 14, Clerk's Office, Walton Superior Court.

According to such plat of survey, the tract herein is more particularly described as follows: BEGINNING at an iron pin located on the Northwesterly right of way of Monroe-Youth Road (shown as being 80 feet in width) situated 327.0 feet Southwesterly along such right of way from its intersection with the centerline of Big Flat Creek; Running thence along such right of way South 56°31′30″ West 937.09 feet to an iron pin; Running thence North 33°11′33″ West 1674.64 feet to an iron pin located on the common land lot line of Land Lots 146 and 147 in said District; Running thence along such land lot line North 60°12′53″ East 1045.30 feet to an iron pin located at the common land lot corner of Land Lots 122, 123, 146, & 147; Running thence along the common land lot line of Land Lots 123 & 146 South 29°29′18″ East 1614.8 feet to the POINT

OF BEGINNING, including but not limited to all buildings, structures, fixtures, furnishings, appurtenances, and any and all contents therein.

3. 232 Longbranch Road, Temple, Carroll County, Georgia, further described as:

Lying and being in Land Lot 200 of the 6th District of Carroll County, Georgia and being more particularly described as follows:

BEGINNING at an iron pin on the west side of Longbranch Road as measured 810 feet, northerly of the point where said road intersects the South Land Lot Line and running thence North 89 Degrees 47 Minutes West 1507.85 feet to an iron pin; thence North 0 Degrees 06 Minutes East 763.66 feet to an iron pin; thence South 89 Degrees 47 Minutes East 1502.52 feet to an iron pin on the west side of said road and running thence South 0 Degrees 18 Minutes East 763.66 feet to an iron pin at the Point of Beginning, being 26.39 acres according to a plat of survey for Jerry and Glenda Moore prepared by A. J. Harris on September 15, 1983, recorded in Plat Book 25, Page 33, Carroll County records, including but not limited to all buildings, structures, fixtures, furnishings, appurtenances, and any and all contents therein.

4. 232 Longbranch Road, Temple, Carroll County, Georgia, further described as:

All that tract or parcel of land lying and being in Land Lot 200 of the 6th District of Carroll County, Georgia, and more particularly described as follows: BEGINNING at an iron pin on the west right of way of a county road 20 feet from the southeast corner of Land Lot 200, and from said point of beginning, running north 89 degrees 50 minutes west a distance of 1513.8 feet to a rock corner; thence north 0 degree 13 minutes west a distance 810 feet

to an iron pin which iron pin is 139 feet south of a Georgia Power right of way line; thence south 89 degrees 47 minutes east a distance of 1512.6 feet to an iron pin on the west right of way of the county road; thence along the said right of way of said county road south 0 degrees 18 minutes east a distance of 810 feet and to the point of beginning, and containing 28 acres and being a part of that property.

The following interests of the defendant JAMES MOORE:

1. Dixie Boring Company, Incorporated, 2661 Mount Zion Road, Oxford, Georgia, including but not limited to equipment, machines, devices, vehicles, furniture, contracts, accounts receivable, shares of stock or other evidence of ownership or interest in such corporation.

All in violation of Section 848, Title 21, United States Code, and Section 2, Title 18, United States Code.

/s/ George Phillips
United States Attorney

A TRUE BILL:

/s/ [Illegible]
Foreperson of the Grand Jury

APPENDIX C

[749] THE COURT: Under the rules, the Court is required to advise counsel as to the instructions that are to be given by the Court. Does the government affirm that you are instructed as to the Court's prospective charge?

[750] MS. HARRIS: Yes, Your Honor.

THE COURT: Do you also for the defendant, Mr. Sneed?

MR. SNEED: Yes, Your Honor. With one exception, there was one question in my mind as to whether the Court was going to require the jury to find, to unanimously identify among themselves first, three predicate offenses before they could find the defendant guilty of a continuing criminal enterprise, and secondly, to enumerate those predicate offenses on any type of form. I think we left it—I was unclear.

THE COURT: Of course, the Court will require the government in the Court's instructions to prove and for the jury to be satisfied that three predicate offenses have been proven beyond a reasonable doubt. I will not require the jury, though, to provide any written statement as to charges that they find have been proven. Does that answer your inquiry?

MR. SNEED: Yes, sir. Will you instruct the jury, will you instruct the jury that they have to unanimously agree as to the particular predicate offenses?

MS. HARRIS: I don't think that's a correct statement of the law. They have to unanimously find he's guilty; they don't have to unanimously find each element.

THE COURT: I will instruct them in accordance with the instructions that we discussed, and will not add any additional instruction or explanation if that's your question.

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APPENDIX D

[800] BY THE COURT:

Court will now take a recess for ten minutes, after which I will instruct you as to the applicable law. After the instructions on the law, you will have your lunch before you begin your deliberations. Take a ten minute recess.

(Recess.)

BY THE COURT:

Members of the jury, you have now heard all of the evidence in the case, as well as the final arguments of the lawyers for both the government and the defendant. It becomes my duty therefore to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are in effect two judges. I am one of those judges. The other is you, the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable in the case.

You as jurors are the judges of the facts, but in determining what actually happened in the case, that is in reaching your decision as to the facts, it is your sworn duty to follow the law I am now in the process of defining for you, [801] and you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction or to question the wisdom or correctness of any rule of law that I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you regardless of the consequences. By the same token, it is also your duty to base your verdict solely upon the testimony and exhibits received into

the record in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case.

The indictment or formal charge against the defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require the defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of the defendant not to testify. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit him. Thus while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt.

[802] A reasonable doubt is a real doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you're convinced that the defendant has been proved guilty beyond a reasonable doubt then say so by your verdict. If you're not convinced, then say so by your verdict.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term evidence includes the sworn testimony of the witnesses and the exhibits admitted in the record. Remember that any statements, objections or arguments made by the lawyers are not evidence in the case.

The function of the lawyers is to point out those things that are more significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape

your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also during the course of the trial I occasionally make comments to the lawyers or ask questions of a witness or admonish a witness concerning the manner in which he should [803] respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion whatsoever concerning any of the issues in the case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

It is not only the right, but the duty of an attorney to protect the interest of his or her client by making objections to the introduction of or moving to strike out evidence he or she deems inadmissible or improper, as well as by offering evidence he or she believes competent for admission. The fact that the attorney for either the government or the defendant may have made objections, motions or offers, regardless of my ruling thereon, must not prejudice you for or against the party represented by that attorney. So while you should consider only the evidence in the case, you're permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. [804] Circumstantial evidence is proof a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you apply

all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you should consider his or her relationship to the government or the defendant, his or her interest, if any, in the outcome of the case, his or her manner of testifying, his or her opportunity to observe or acquire knowledge concerning the facts about which he or she testified, his or her candor, fairness and intelligence, and the extent to which he or she has been supported or contradicted by other credible evidence. You may in short accept or reject the testimony of any witness in whole or in part. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the evident of a smaller number of witnesses as to any fact is more credible than the testimony of [805] a larger number of witnesses to the contrary.

As stated earlier, a defendant has a right not to testify. If he does testify, however, his testimony should be weighed and considered and his credibility determined in the same way as that of any other witness. A witness may be discredited or impeached by contradictory evidence, by a showing that he or she testified falsely concerning material matters, or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness's present testimony. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The fact that a witness has been previously convicted of a felony or a crime involving dishonesty or false state-

ment is also a factor you may consider in weighing the credibility of that witness. The fact of such conviction does not necessarily destroy the witness's credibility but is one of the circumstances you may take in account in determining the weight to be given to this testimony.

The testimony of an alleged accomplice and the testimony of one who provides evidence against a defendant as an informer for pay or for immunity from punishment or pursuant to a plea agreement providing for a lesser sentence than the [806] witness would have otherwise been expected to for the offense or offenses to which he pled guilty or providing for the dismissal of charges, or more personal advantages or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You the jury must decide whether the witness's testimony has been affected by any of those circumstances or by his interest in the outcome of the case, or by prejudice against the defendant or by the benefits that he has received either financially or as a result of being immunized from prosecution, and if you determine that the testimony of such a witness was affected by any one or more of those factors you should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

The rules of evidence provide that if scientific, technical or specialized knowledge might assist the Judge in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify and state his opinion concerning such matters. You should consider each expert opinion received in evidence in the case and give it such weight as you might think it deserves. If you should decide [807] that the opinion of an expert witness is not based upon sufficient education

and experience or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

The defendant, John Ervin Dekle, Jr., is charged in Count V of the indictment with knowingly engaging in a continuing criminal enterprise in violation of Section 848, Title 21, United States Code. Section 848, Title 21 provides in pertinent part as follows: a person is engaged in a continuing criminal enterprise if, 1, he violates any provision of this subchapter or subchapter 2 of this chapter, and punishment for which is a felony, and 2, such violation is a part of a continuing series of violations of this subchapter or subchapter 2 of this chapter, A, which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position or organizer, a supervisory position or any other position of management, and B, from which such person obtains substantial income or resources.

The essential elements of the offense charged in Count V, each of which elements the government must prove beyond a reasonable doubt in order to establish the guilt of the defendant, John Ervin Dekle, Jr., as to such offense are as follows: First, that the Defendant, John Ervin Dekle, Jr., [808] committed the conspiracy offenses charged in Count V of the indictment, of conspiracy to possess marijuana with the intent to distribute same, or committed any additional violations of the federal drug laws, or any combination of these offenses, and second, that the violations of any of these offenses by the defendant, John Ervin Dekle, Jr., are part of a continuing series of violations by him of the federal narcotics laws, and third, that the defendant undertook to commit such a series of offenses in concert with five or more persons, and fourth, that the defendant occupied the position of organizer or supervisor or any other position of management with respect to such five or more persons in said undertaking, and fifth, that the defendant obtained sub-

stantial income or resources from said continuing series of such violations.

I will now discuss in more detail and define for you the meaning of certain terms in the statute, and in these instructions relating to the five elements of the continuing criminal enterprise offense charged in Count V.

The first element under this count is for you to determine whether you believe beyond a reasonable doubt that the defendant, John Ervin Dekle, Jr., is guilty of any of the offenses just described or concerning which the government has elicited proof, according to instructions I have given you. In determining whether the defendant is guilty of any of those offenses, it should be remembered that a defendant is not [809] responsible for the acts or declarations of other alleged participants in the continuing criminal enterprise until it is established beyond a reasonable doubt that the enterprise existed and from evidence of his own acts and statements that the defendant was one of its members.

A continuing criminal enterprise is a kind of partnership, so that under the law each member is an agent or partner of every other member, and each member is bound by or responsible for the acts and statements of every other member made in furtherance of their unlawful scheme.

If you determine that the defendant is guilty of any of these offenses you must determine next the second element of Count V, namely, whether the violation or violations are a part of a continuing series of violations of the federal drug laws. The term series generally means three or more and the term continuing means enduring, subsisting or for a definite period or intending to cover or apply to successive similar occurrences. Thus you must find beyond a reasonable doubt that the defendant committed three or more successive violations of the federal drug laws over a definite period of time with a single or substantially similar purpose. Thus, you must find beyond a reasonable doubt that the defendant is

guilty as charged in Count V and that the conduct in that count, together with any additional violations of the drug laws, constituted a total of three or more felony violations of the federal drug [810] laws committed over a period of time with a single or similar purpose. This will constitute a finding that Defendant Dekle engaged in a continuing series of violations.

The third requirement for you to determine beyond a reasonable doubt is that Defendant Dekle committed such violations in concert with five or more persons. It is not required that the five or more persons be engaged with the defendant in the commission of the continuing series of violations at the same moment or that all five were present at the same time, or that all five were present at the same place. It is not required that the defendant acted in concert with five or more persons in the commission of any single offense, that is one of the series of offenses constituting the continuing criminal enterprise. For purposes of this element, it is sufficient if it is proven beyond a reasonable doubt that during the course of the commission of the continuing series of violations the Defendant Dekle supervised a total of five or more persons.

The fourth requirement is that you find beyond a reasonable doubt that the defendant occupied a position of organizer, a supervisory position or any other position of management. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one operation or enterprise. A supervisory position can be defined as meaning [811] one who manages or directs or oversees the activities of others. However, it is not required that the evidence show that the defendant was the only person who occupied a position of organizer, supervisor or manager. It is also not required that the superior-subordinate relationship of the defendant with others exist at the same moment or that these relationships were all of the same type.

The fifth requirement is that you find beyond a reasonable doubt that the Defendant Dekle obtained substantial income or resources from the continuing series of violations of the federal drug laws.

The term substantial means of real worth and importance, of considerable value. Valuable. The term income can include money or other property received or acquired from the transaction in violation of the drug laws. Substantial income does not necessarily mean net income. From what I've alrcady said it would follow that the phrase substantial income should be construed as far as possible in an objective manner, that is, in order to support a conviction under Count V you must find that the defendant received what any reasonable person would consider to be considerable funds from engaging in a continuing violation of the drug laws.

Count V of the indictment charges conspiracies to knowingly and intentionally possess with intent to distribute marijuana. Possession of marijuana with the intent to [812] distribute is an unlawful act which is prohibited by Title 21, United States Code, Section 841 (a) (1). Sections 846 and 841(a) (1), Title 21, provide in part that any person who conspires to commit any offense defined in this subchapter is punishable under the laws of the United States. It shali be unlawful for any person to knowingly or intentionally possess with intent to distribute a controlled substance. Marijuana is a controlled substance.

A conspiracy is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey or disregard the law. The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated beween them-

selves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in this case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. Neither must it be proved that all of the persons charged to have been [813] members of the conspiracy were such, nor that the alleged conspirators actually succeeding in accomplishing their unlawful objectives. What the evidence in the case must show beyond a reasonable doubt is that two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment, and that the defendant willfully became a member of such conspiracy.

The indictment charges that the defendant conspired to knowingly and intentionally possess with intent to distribute controlled substances. The essential elements of such charges are the knowing and willful possession of a controlled substance with the intent to distribute it. One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So if a defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion, that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy. Of course, mere presence at the scene of an alleged transaction or event or mere knowledge that a crime was being committed or mere similarity of conduct among various persons and the fact that they may have associated with each [814] other and may have assembled together and discussed common aims and inter-

ests does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy but who happens to act in a way which advances some object or purpose of a conspiracy does not thereby become a conspirator. In your consideration of the conspiracy offense as alleged in the indictment, you should first determine from all of the testimony and evidence in the case whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged you should next determine whether or not the defendant willfully became a member of such conspiracy.

In determining whether the defendant was a member of an alleged conspiracy, however, you should consider only that evidence, if any, pertaining to his own acts owned statements. He is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, first, that a conspiracy existed, and second, from evidence of his own acts and statements that the defendant was one of its members.

On the other hand, if and when it does appear beyond a reasonable doubt from the evidence in the case that a conspiracy did exist as charged and that the defendant was one of its members, then the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects [815] by any other proven member of the conspiracy may be considered by you as evidence against the defendant, even though he was not present to hear the statement made or see the act done. This is true because, as stated earlier, a conspiracy is a kind of partnership, so that under the law each member is an agent or partner of every other member. Each member is bound by or responsible for the acts and statements of every other member made in pursuance of their unlawful scheme.

To possess with intent to distribute simply means to possess with intent to deliver or transfer possession of a

controlled substance to another person with or without any financial interest in the transaction.

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who although not in actual possession knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be joint or sole. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. You may find that the element of [816] possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

The crime charged in this indictment requires proof of specific intent before the defendant can be convicted. Specific intent means more than the general intent to commit the act. To establish specific intent the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be detemrined from all the facts and circumstances surrounding the case.

Unlawfully means contrary to law, so to do an act unlawfully means to do willfully something which is contrary to law or without legal justification.

You will note that the indictment charges that certain offenses were committed on or about a certain date. The proof need not establish with certainty the exact dates of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the dates alleged.

The word knowingly as that term is used herein means that the act was done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The word willfully as that term is used herein means [817] that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law.

The law permits the jury to find an accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as stated by the Court. So in this instance with respect to the offenses charged in Count V of the indictment, if you should find the accused not guilty of the offense as charged in the indictment and defined in these instructions then you should proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged. The offense of participating in a continuing criminal enterprise as charged in Count V includes the lesser included offense of conspiracy to possess with intent to distribute marijuana.

With respect to the crime charged in Count V then, if you should find the defendant not guilty as to that offense as charged, you must then proceed to determine if the defendant is guilty or not guilty of the lesser included offense of conspiracy to possess with intent to distribute marijuana. In other words, such lesser included offense would consist of proof beyond a reasonable doubt of the first element defined above, but not the second, third, fourth, and fifth.

[818] The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court or Judge and should never be considered by you in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

Any verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. Remember at all times you are not partisans, you are judges. Judge of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. That person will have no more [819] influence, nor will his or her vote carry any more weight than that of any of the rest of you.

A form of verdict has been prepared for your convenience. It has the title of the case and then the words jury verdict. Underneath jury verdict is the following: "We the jury find the defendant, John Ervin Dekle, Jr., guilty of the charge in Count V of the indictment," with a box opposite it to the left. Underneath that is the following: "We the jury find the defendant, John Ervin Dekle, Jr., not guilty," with a box to the left of it. When you reach unanimous agreement, then the foreman or forewoman will place an "X" in the box opposite the verdict that is applicable. If your verdict is guilty of Count V the "X" will be placed in the box opposite the sentence, "We the jury find the defendant, John Ervin Dekle, Jr., guilty of Count V of the indictment." On the

contrary, if your verdict is not guilty then the "X" will be placed in the box opposite the sentence, "We the jury find the defendant John Ervin Dekle, Jr., not guilty."

The verdict form goes on as follows. If the jury finds the defendant guilty of Count V, then the jury should stop here. In other words, if you found the defendant guilty of Count V you will not read any further. But, I'm reading from it now, if the jury finds the defendant not guilty of Count V, then the jury should next proceed to determine whether the defendant is guilty or not guilty of the lesser included [820] offense of conspiracy to possess with intent to distribute marijuana as described in paragraph one of Count V. Then there are two boxes underneath that sentence, with sentences as follows. "We the jury find the defendant, John Ervin Dekle, Jr., guilty of conspiracy to possess with intent to distribute marijuana." Underneath that is the following: "We the jury find the defendant, John Ervin Dekle, Jr., not guilty of conspiracy to possess with intent to distribute marijuana." In your consideration the foreman or forewoman will place the "X" in the applicable box after you reach a unanimous verdict. Then the foreman or forewoman will date the verdict. There is a line underneath it for that person to sign. There are eleven more lines for the rest of you to sign signifying your unanimous verdict.

When you have had the verdict filled in, you will then be returned to the courtroom. During your deliberations should you desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom in order that I may address you orally. I caution you, however, with regard to any message or question you might send, you should never state or specify your numerical division at that time.

[821] There is one more matter I must take up with the lawyers before you retire to consider your verdict. You'll be conducted again to the jury room for a few minutes. After you come back to the courtroom, I will then discharge you to consider your verdict. It will be at that time that you will have your lunches. Lunches will be ordered for you. You're excused now.

(Jury leaves.)

THE COURT: Does the government have any objections to the instructions given by the Court or request any additional instructions?

MS. HARRIS: Your Honor, I just need to ask the Court one thing. Was the similar act instruction read?

THE COURT: No, ma'am.

MS. HARRIS: Then we have no objections, no additions.

THE COURT: Does the defendant have any objection to the jury charge or request any additional instructions? We'll take first objections.

MR. SNEED: Would you mind if we took first additional instructions?

THE COURT: No, sir, if you have it in that form.

MR. SNEED: I think it would be easier for me. Will Your Honor, as we discussed in our off-the-record discussion before the jury charge, I had requested and I think the [822] defendant is entitled to a form of the verdict wherein the defendant would be—the jury would be instructed that they would have to unanimously agree upon the specific predicate offenses which they believe make up the charge of the continuing criminal enterprise, and wherein the jury would have to specify those predicate offenses for which they believe the defendant participated in that amounts to the continuing criminal enterprise. Whether you call it form of the verdict or jury instruction or whether you call it an interrogatory to the jury, you know, any form, I think the defendant is entitled to and would request that.

THE COURT: All right, sir. The Court is of the opinion that the jury verdict form is proper and that the jury should not be required to answer and list offenses. There's been proof adduced on that and argument of counsel as to the specific offenses.

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